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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 00–27)

19 CFR Part 101

TECHNICAL CORRECTION;
DESCRIPTION OF GRAMERCY, LOUISIANA, BOUNDARIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of Customs by correcting the boundary description of Gramercy, Louisiana.

EFFECTIVE DATE: April 20, 2000.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Chief, Regulations Branch, U.S. Customs Service, 202–927–2268.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs established a port of entry of Gramercy, Louisiana, by a final rule document published as Treasury Decision (T.D.) 82–93 in the Federal Register (47 FR 21039) on May 17, 1982. A description of the port of entry was set forth in the document.

On May 31, 1984, Customs published in the Federal Register (49 FR 22629) T.D. 84–126, a final rule document setting forth the port limits of all the ports in the then New Orleans Customs district. One of the ports, of which the boundaries were described, was Gramercy, Louisiana. The document extended the limits of the Gramercy port from those set forth in T.D. 82–93.

In a document published in the Federal Register (49 FR 27142) on July 2, 1984, Customs delayed the effective date of T.D. 84–126 regarding the extension of the port boundaries of Gramercy. This document stated that "[t]he listing for Gramercy shall remain as set forth in section 101.3(b), Customs Regulations," meaning that the description of the Gramercy port would continue to be as set forth in T.D. 82–93.

The Customs Regulations correctly reflected that the port limits of Gramercy were as set forth in T.D. 82–93 until T.D. 95–77 was published in the Federal Register (60 FR 50008) on September 27, 1995. In that document, which included a revision of section 101.3 to reflect the reorganization of Customs, the reference to T.D. 84–126 was inadvertently inserted in the "Limits of port" column next to the listing of the port of entry of Gramercy under the State of Louisiana.

This document corrects the error by removing the reference "(Restated in T.D. 84–126)" in the "Limits of port" column adjacent to the entry of Gramercy in the "Ports of entry column" under the State of Louisiana in section 101.3(b), Customs Regulations.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE

Because this document relates to agency organization and management and merely corrects the geographical description of a port, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

REGULATORY FLEXIBILITY ACT

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12866

Agency organization matters are exempt from consideration under Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Customs ports of entry, Exports, Imports, Organization and functions (Government agencies).

AMENDMENT TO THE REGULATIONS

Accordingly, Part 101 of the Customs Regulations is amended as set forth below.

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 and the specific authority citation for § 101.3 continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * *

2. The list of ports in §101.3(b)(1) is amended, under the State of Louisiana in the entry for Gramercy, by removing in the "Limits of port" column the words "(Restated in T.D. 84–126)."

Dated: April 14, 2000.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, April 20, 2000 (65 FR 21138)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

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James L. Watson

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Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 00–28)

SKF USA INC. AND SKF GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 99–08–00473

Plaintiffs, SKF USA Inc. and SKF GmbH (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 64 Fed. Reg. 35,590 (July 1, 1999).

Specifically, SKF contends that Commerce erred in: (1) conducting a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the ninth administrative review of the applicable antidumping duty order; (2) determining that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; (3) using aggregate data of all foreign like products under consideration for normal value in calculating profit for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2)(A) (1994); and (4) excluding below-cost sales from the CV profit calculation.

Commerce responds that it properly: (1) conducted a duty absorption inquiry under § 1675(a)(4); (2) used a reasonable methodology and determined that duty absorption existed; (3) calculated CV profit pursuant to § 1677b(e)(2)(A); and (4) excluded below-cost sales from the CV profit calculation. The Torrington Company presents arguments similar to those of the defendant.

Held: SKF's USCIT R. 56.2 motion is denied in part and granted in part. The case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject review.

[SKF's motion is denied in part and granted in part. Case remanded.]

(Dated March 22, 2000)

Steptoe & Johnson LLP (Herbert C. Shelley and *Alice A. Kipel)* for SKF USA Inc. and SKF GmbH.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director); of counsel: *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for The Torrington Company.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, SKF USA Inc. and SKF GmbH (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment

upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 64 Fed. Reg. 35,590 (July 1, 1999).

Specifically, SKF contends that Commerce erred in: (1) conducting a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the ninth administrative review of the applicable antidumping duty order; (2) determining that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; (3) using aggregate data of all foreign like products under consideration for normal value ("NV") in calculating profit for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2)(A) (1994); and (4) excluding below-cost sales from the CV profit calculation.

Commerce responds that it properly: (1) conducted a duty absorption inquiry under § 1675(a)(4); (2) used a reasonable methodology and determined that duty absorption existed; (3) calculated CV profit pursuant to § 1677b(e)(2)(A); and (4) excluded below-cost sales from the CV profit calculation. The Torrington Company ("Torrington") presents arguments similar to those of the defendant.

The Court will address each of these arguments in turn.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from several countries, including Germany. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900. This case concerns the ninth administrative review of the antidumping duty order on AFBs from Germany for the period of review ("POR") covering May 1, 1997 through April 30, 1998. *See Final Results*, 64 Fed. Reg. at 35,590. In accordance with 19 C.F.R. § 351.213 (1998), Commerce initiated the ninth review on June 29, 1998. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188. On February 23, 1999, Commerce published the preliminary results of the ninth review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Rescission of Administrative Reviews ("Preliminary Results")*, 64 Fed. Reg. 8790. Commerce published the *Final Results* on July 1, 1999. *See* 64 Fed. Reg. at 35,590.

Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as

amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. *Substantial Evidence Test*

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera*, 340 U.S. at 488)).

II. *Chevron Two-Step Analysis*

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Flora Trade Council v. United States*, 23 CIT ____, 41 F. Supp. 2d 319,

323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992); *see also Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States Dep't of Commerce*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). "In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT ____, ____, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. *Commerce's Duty Absorption Inquiry*

A. Background

During an administrative review initiated two or four years after the "publication" of an antidumping duty order, Commerce, if requested by a domestic interested party, "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter." 19 U.S.C. § 1675(a)(4).[1] Commerce shall notify the International Trade Commission ("ITC") of its findings regarding such duty absorption for the ITC to consider in conducting a five-year ("sunset") review under 19 U.S.C. § 1675(c), *see* 19 U.S.C. § 1675(a)(4), and the ITC will take such findings into account in determining whether material injury is likely to continue or recur if an order were revoked under § 1675(c), *see* 19 U.S.C. § 1675a(a)(1)(D).

On May 29, 1998 and July 29, 1998, Torrington requested that Commerce conduct a duty absorption inquiry pursuant to 19 U.S.C. § 1675(a)(4) with respect to various respondents, including SKF, to determine whether antidumping duties had been absorbed during the POR. *See Final Results*, 64 Fed. Reg. at 35,600. SKF and other respond-

[1] Subsection (a)(4) of 19 U.S.C. § 1675 was added to the antidumping law by the Uruguay Round Agreements Act in 1994. *See* Pub. L. No. 103-465, § 220, 108 Stat. 4809, 4860.

ents objected to such an inquiry, maintaining that Commerce was without statutory authority to conduct a duty absorption inquiry for the subject review. *See id.*

In the *Final Results*, Commerce determined that duty absorption had occurred for the POR. *See id.* at 35,601. In asserting its authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders," as defined in 19 U.S.C. § 1675(c)(6)(C) (1994) (that is, antidumping duty orders, *inter alia*, deemed issued on January 1, 1995), regulation 19 C.F.R. § 351.213(j)(2) (1998) provides that Commerce will make a duty absorption determination, if requested, for any administrative review initiated in 1996 or 1998. *See id.* at 35,600–01; *19 CFR Part 351 et al., Antidumping Duties; Countervailing Duties; Final [R]ule*, 62 Fed. Reg. 27,296, 27,394 (effective June 18, 1997) (concerning 19 C.F.R. § 351.213). Commerce, therefore, concluded that: (1) because the antidumping duty order on the AFBs in this case had been in effect since 1989, the order is a "transition order" pursuant to § 1675(c)(6)(C); and (2) since this review was initiated in 1998 and a request was made, it had the authority to make a duty absorption inquiry for this POR. *See Final Results*, 64 Fed. Reg. at 35,600.

B. Contentions of the Parties

SKF contends that Commerce lacked authority under 19 U.S.C. § 1675(a)(4) to undertake a duty absorption inquiry for this POR. *See* SKF's Br. Supp. Mot. J. Agency R. at 2–3, 9–15; SKF's Reply Br. at 2–13. In particular, SKF argues that for conducting such an inquiry under § 1675(a)(4), the statute clearly provides that the inquiry must occur in the second or fourth review after publication of the antidumping duty order, not in any other review. *See* SKF's Br. Supp. Mot. J. Agency R. at 10. SKF asserts that since Commerce conducted a duty absorption inquiry for this POR nine years after the publication of the applicable antidumping duty order (that is, May 15, 1989), the agency failed to satisfy § 1675(a)(4). *See id.* at 11.

Further, although SKF recognizes that the 1989 order is a "transition order" as defined under the sunset review provision 19 U.S.C. § 1675(c)(6)(C), SKF asserts that corresponding § 1675(c)(6)(D), concerning "[i]ssue date for transition orders," is inapplicable to a duty absorption inquiry conducted under § 1675(a)(4). *See id.* at 12–15. Specifically, SKF notes that although § 1675(c)(6)(D) provides "a transition order shall be treated as issued on the date the WTO Agreement enters into force with respect to the United States" (that is, January 1, 1995), the provision expressly limits the deemed "issued date" for transition orders to sunset reviews under § 1675(c). SKF argues that since § 1675(c)(6)(D)'s January 1, 1995 issuance date does not apply to § 1675(a)(4), the "publication" date of the order remains unchanged at May 15, 1989 and, therefore, Commerce is precluded from initiating a duty absorption inquiry for a review nine years after the initial publication of the order. *See id.* at 15. SKF thereby maintains that if Com-

merce's action is not authorized by statute, the agency did not have authority to promulgate 19 C.F.R. § 351.213(j)(2) to give itself such authority, that is, such a promulgation is *ultra vires*. *See* SKF's Reply Br. at 11–13.

In sum, SKF argues that since nothing in the statute nor legislative history contradicts the plain reading of § 1675(a)(4), Commerce lacked authority to conduct a duty absorption inquiry for the ninth administrative review of the 1989 antidumping duty order and, therefore, its inquiry should be vacated. *See* SKF's Br. Supp. Mot. J. Agency R. at 2, 11. Alternatively, SKF argues that even if Commerce possessed the authority to conduct such an inquiry, Commerce's methodology for determining duty absorption was flawed and contrary to law and, accordingly, the case should be remanded to Commerce to modify its methodology. *See id.* at 3, 16–37.

Commerce responds that it properly: (1) construed §§ 1675(a) and (c) as authorizing it to make duty absorption inquiries for antidumping duty orders that were issued and published prior to January 1, 1995; and (2) devised and applied a reasonable methodology in determining the existence of duty absorption in this case. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 2, 5–25. Commerce asserts that SKF's contention, that the special rules under § 1675(c)(6) governing the scheduling for sunset reviews of transition orders have no effect when Commerce may make duty absorption findings under § 1675(a)(4), ignores the rules of statutory construction which require that parts of a statutory scheme should be read together so as to give effect to the intent of Congress. *See id.* at 9, 11. In particular, Commerce claims that the legislative history indicates that Congress intended that the ITC would consider duty absorption findings in all sunset reviews irrespective of whether the antidumping orders were issued before or after January 1, 1995. *See id.* at 12. Commerce additionally claims that a strong indication that Congress intended that the statutory provisions regarding duty absorption and the scheduling for sunset reviews of transition orders should be construed together is found in the explicit reference to subsection (c) of § 1675 contained in the last sentence of § 1675(a)(4). *See id.* at 12–13. Commerce also contends that failure to consider these provisions collectively would lead to absurd results because Commerce would be precluded from making duty absorption determinations in administrative reviews of transition orders, and the ITC would be unable to consider duty absorption findings for sunset reviews of hundreds of transition orders. *See id.* at 13.

Torrington generally agrees with the positions taken by Commerce. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 2–3, 10–30. Torrington acknowledges that § 1675 addresses the timing of sunset reviews of pre-URAA antidumping duty orders (that is, "transition orders"), but does not directly speak to the timing of duty absorption inquiries in the context of administrative reviews of pre-URAA orders. *See id.* at 25. Torrington, nevertheless, argues that such an omission does not sup-

port SKF's restrictive reading of § 1675(a)(4). *See id.* Rather, Torrington contends, *inter alia*, that "'[w]hether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole.'" *Id.* at 26 (quoting *Massachusetts Trustees of E. Gas & Fuel Assocs. v. United States*, 312 F.2d 214, 220 (1st Cir. 1963)). Torrington claims that the antidumping provisions taken together and the accompanying URAA legislative history show that a duty absorption inquiry is: (1) a critical factor both in the context of Commerce's determination whether dumping is likely to continue or recur and the ITC's determination whether injury is likely to continue or recur; and (2) as relevant to transition orders as it is to post-URAA orders. *See id.* at 19–26. Further, Torrington asserts that there is no indication in § 1675(a)(4) and § 1675(c)(6)(D), through omission or otherwise, that Congress intended to limit a duty absorption inquiry of post-URAA orders to only the second and fourth year after the issuance of such orders. *See id.* Torrington also asserts that the statutory omissions concerning duty absorption inquiries of pre-URAA orders have less interpretative force in the administrative setting where the Court must defer to Commerce's interpretation of the antidumping statute unless Congress has directly spoken to the question at issue. *See id.* at 25 (citation omitted).

C. Analysis

The issue primarily presented is whether 19 U.S.C. § 1675(a)(4) authorizes Commerce to conduct a duty absorption inquiry for a pre-URAA antidumping duty order, that is, a transition order.

Title 19, United States Code, § 1675(a)(4) specifically states that Commerce, if requested, shall conduct a duty absorption inquiry for any review under subsection (a) "initiated 2 years or 4 years after the publication of an antidumping duty order under section 1673e(a) of this title * * *. [Commerce] shall notify the [ITC] of its findings regarding such duty absorption for the [ITC] to consider in conducting a review under subsection (c) of this section." *See* 19 U.S.C. § 1673e(a) (concerning Commerce's publication of antidumping duty order). In addition, § 1675(c)(6)(C) provides that, for purposes of § 1675, "the term 'transition order' means * * * an antidumping duty order * * * which is in effect on the date the WTO Agreement enters into force with respect to the United States." Section 1675(c)(6)(D) further provides that "[f]or purposes of this subsection, a transition order shall be treated as issued on the date the WTO Agreement enters into force with respect to the United States, if such order is based on an investigation conducted by both [Commerce] and the [ITC]." The "WTO Agreement," *see* 19 U.S.C. § 3501(9) (1994), entered into force for the United States on January 1, 1995, *see* 19 U.S.C. § 3511(b) and note (1994) (Proclamation No. 6780 para. 2 (Mar. 23, 1995), *in* 60 Fed. Reg. 15,845).

Although the antidumping duty order in dispute is a transition order under § 1675(c)(6)(C), the Court finds that the deemed January 1, 1995 issuance date of § 1675(c)(6)(D) is inapplicable to the order. The plain

language of § 1675(c)(6)(D) specifically applies such a date "[f]or purposes of * * * subsection" (c) of § 1675, that is, for purposes of sunset reviews, rather than for duty absorption inquiries under subsection (a). While the Court should avoid interpreting statutes that render language superfluous and should consider parts of a statutory scheme together to ascertain congressional intent, such "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). In particular, this Court "must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 253–54 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) ("It is axiomatic that statutory interpretation begins with the language of the statute. If * * * the language is clear and fits the case, the plain meaning of the statute will be regarded as conclusive.") (citations omitted).

Because the text of § 1675(c)(6)(D) unambiguously and specifically applies the new issuance date of transition orders to subsection (c), the Court disagrees with Commerce and Torrington that subsection (a) and (c) must be read as one. Moreover, the Court finds that the last sentence of § 1675(a)(4)'s notice requisite is irrelevant because the first condition precedent of the statute, that there exists a review "initiated 2 years or 4 years after the publication of antidumping duty order," must be satisfied before conducting a duty absorption inquiry. The Court, therefore, concludes that the publication and effective date of antidumping duty order at issue remains greater than four years, that is, May 15, 1989.

Since 19 U.S.C. § 1675(c)(6)'s special transition rules do not support Commerce's authority to conduct a duty absorption inquiry for a pre-URAA antidumping duty order, the Court must consider whether there is clear congressional intent that 19 U.S.C. § 1675(a)(4) should be applied retrospectively (as opposed to prospectively) to such an order.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Lindh v. Murphy*, 521 U.S. 320 (1997), the Supreme Court articulated the following three-part test for determining whether a statute may be lawfully be applied retrospectively. *See Craig v. Eberly*, 164 F.3d 490, 493–94 (10th Cir. 1998); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 159–66 (3rd Cir. 1998). First, a court must "determine whether Congress has expressly prescribed the statute's proper reach," and if it has, the court must give effect to congressional will, subject only to constitutional restraints. *Landgraf*, 511 U.S. at 280. Second, if Congress did not expressly speak to the issue, the court employs normal rules of statutory construction to ascertain the statute's temporal scope. *See Lindh*, 521 U.S. at 326; *In re Minarik*, 166 F.3d 591, 597 (3rd Cir. 1999). Third, in situations where rules of statutory construction do not clarify the stat-

ute's temporal scope, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If the court finds that the statute has retroactive effect, it triggers the traditional judicial "presumption against statutory retroactivity," *id.* at 272, "absent clear congressional intent favoring such a result," *id.* at 280.

The Supreme Court further clarified that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269–70 (citation and footnote omitted); *see American Permac, Inc. v. United States*, 191 F.3d 1380, 1381 (Fed. Cir. 1999); *Travenol Lab., Inc. v. United States*, 118 F.3d 749, 752–53 (Fed Cir. 1997); *Goodyear Tire & Rubber Co. v. Dep't of Energy*, 118 F.3d 1531, 1536–37 (Fed. Cir. 1997).

The first step under the *Landgraf/Lindh* test then is to look at the statutory text of the URAA and determine whether Congress has expressly prescribed whether 19 U.S.C. § 1675(a)(4) should be applied prospectively or retrospectively. Section 291 of the URAA specifies that, "[e]xcept as provided in section 261," the URAA amendments "shall take effect on * * * the date on which the WTO Agreement * * * enters into force with respect to the United States," that is, January 1, 1995, and "apply with respect to * * * reviews initiated under section 751 of [the Tariff Act of 1930]," that is, administrative reviews of determinations under 19 U.S.C. § 1675. URAA § 291(a)(2), (b), 108 Stat. at 4931; *see* 19 U.S.C. § 1671 note (1994) (URAA effective dates); *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)). The Court first notes that § 261 of the URAA is inapplicable here. Second, the Court finds that § 291's language provides an "unambiguous directive," *Landgraf*, 511 U.S. at 263, from Congress as to the temporal reach of the URAA amendment § 1675(a)(4), specifically, that it must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews. Since § 291 contains an express command from Congress on the temporal reach of § 1675(a)(4), the Court must follow it and our inquiry is done.

Accordingly, the Court finds that Commerce lacked statutory authority to conduct a duty absorption inquiry for the pre-URAA antidumping duty order at issue and, therefore, declines to address Commerce's methodology for determining duty absorption. Moreover, the Court finds that since 19 C.F.R. § 351.213(j) is inconsistent with 19 U.S.C. § 1675(a)(4), this part of the regulation is invalid. *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) (holding that "a regulation cannot override a clearly stated statutory enactment")

(citing *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1560 (Fed. Cir. 1992) (noting that a "regulation must be held to be invalid since it does not comport with the clear statutory mandate")); *see also United States v. Larionoff*, 431 U.S. 864, 873 (1977) (concluding that a regulation is valid only if it is consistent with the statute under which it was promulgated); *Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (holding that "[t]hough an agency may promulgate * * * regulations pursuant to authority granted by Congress, no such * * * regulation can confer on the agency any greater authority than that conferred under the governing statute") (citing *Bowen v Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976)).

II. *Commerce's CV Profit Calculation*

A. Background

For this POR, Commerce "used CV as the basis for NV when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 64 Fed. Reg. at 8795. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A).[2] *See Final Results*, 64 Fed. Reg. at 35,611. In applying the preferred methodology for calculating CV profit under § 1677b(e)(2)(A), Commerce determined that the use of "an aggregate calculation that encompasses all foreign like products under consideration for NV represents a reasonable interpretation of [§ 1677b(e)(2)(A)]." *Id.* Commerce also determined that the use of such "aggregate data results in a reasonable and practical measure of profit that [it] can apply consistently where there are sales of the foreign like product in the ordinary course of trade." *Id.* Also, in rejecting respondents' interpretation of "foreign like product" as being limited to the product which is identical or similar to the subject merchandise for purposes of calculating CV profit, Commerce reasoned as follows:

> In accordance with the definition of foreign like product under [19 U.S.C. § 1677(16) (1994)], it is clear that "foreign like product" is not limited to the product which is identical in physical characteristics to the subject merchandise ([§ 1677(16)(A)]) or even to the product that is similar to the subject merchandise ([§ 1677(16)(B)]). Merchandise of the "same general class or kind" as the subject merchandise ([§ 1677(16)(C)]) will qualify as the "foreign like product" in cases where either the identical or the similar merchandise is not available. There is no indication that, by referring to "a foreign like product" in [§ 1677b(e)(2)(A)], Congress intended that profit be calculated upon the basis of merchandise that is identical or similar to the subject merchandise. If Congress had such intentions, then the "preferred" method provided in [§ 1677b(e)(2)(A)] would rarely be applicable since CV ordinarily

[2] Specifically, in calculating constructed value, Commerce is required to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * in connection with the production and sale of a foreign like product [made] in the ordinary course of trade." 19 U.S.C. § 1677b(e)(2)(A).

> becomes necessary for determining normal value when identical or similar home market merchandise is not available for comparison to the U.S. merchandise.

Id. Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to 19 U.S.C. § 1677b(b)(1) (1994). Commerce excluded such below-cost sales because: (1) § 1677b(e)(2)(A) requires Commerce "to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary course of trade"; and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade. *Id.* at 35,612.

B. Contentions of the Parties

SKF contends that Commerce's use of aggregate data that encompasses all foreign like products under consideration for NV for calculating CV profit is contrary to § 1677b(e)(2)(A) and to the explicit hierarchy established by § 1677(16) for selecting "foreign like product" for the CV profit calculation. *See* SKF's Br. Supp. Mot. J. Agency R. at 37–58. In addition, SKF argues, *inter alia*, that Commerce's CV profit calculation under § 1677b(e)(2)(A) is unlawful in that it excluded below-cost sales from the calculation. *See id.* at 3–4; SKF's Reply Br. at 25–48.

Commerce responds that it applied a reasonable interpretation of § 1677b(e)(2)(A) and properly based CV profit for SKF on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Opp'n to Mot. J. Agency R. at 2, 25–42. Also, Commerce argues that it properly excluded below-cost sales. *See id.* at 2–3, 39. Torrington generally agrees with Commerce. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 4, 30–36.

C. Analysis

In *RHP Bearings Ltd. v. United States*, 23 CIT ____, ____, Slip Op. 99–134, at 9–38 (Dec. 16, 1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ____, Slip Op. 99–134, at 32–38. Since SKF's arguments and the methodology at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds that Commerce's CV profit methodology and exclusion of below-cost sales to be supported by substantial evidence and in accordance with law.

III. *Other Issues*

We have considered SKF's other challenges to the *Final Results*, but find them unpersuasive.

CONCLUSION

For the foregoing reasons, the case is remanded to Commerce to annul all findings and conclusions made pursuant to its duty absorption inquiry conducted for the subject review. Commerce's final determination is affirmed in all other respects.

(Slip Op. 00–29)

UNITED STATES, PLAINTIFF *v.*
RALPH NUSSBAUM AND DISCOUNT LOCKS, INC., DEFENDANTS

Court No. 98–12–03234

[Defendant Ralph Nussbaum moves for judgment on the pleadings asserting as defenses to the Government's penalties action under 19 U.S.C. § 1592 that he was denied due process by the U.S. Customs Service in its administrative proceedings, and that the action is barred by the statute of limitations. Nussbaum also moves to defer responses to the Government's pending discovery requests until thirty days following the decision on his motion. *Held:* Stay of the Government's currently pending discovery requests is granted. Motion for judgment on the pleadings is denied as to the due process defense, but decision of his motion is deferred as to the statute of limitations defense. As to that latter defense, the parties may request new discovery limited solely to the issues raised by the Government's claim of equitable estoppel. After completion of the new limited discovery, Nussbaum may renew his defense based on the statute of limitations.]

(Dated March 22, 2000)

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director; *A. David Lafer*, Senior Trial Counsel *(Lucius B. Lau*, Attorney), Commercial Litigation Branch, Civil Division, United States Department of Justice; *Steven L. D'Alessandro*, Assistant Counsel, United States Customs Service, of counsel, for plaintiff.
Singer & Singh (Sherry L. Singer, Esq.) for defendant Ralph Nussbaum.

OPINION AND ORDER

I.

INTRODUCTION

WATSON, *Senior Judge:* This is a civil action for penalties commenced by the Government pursuant to 19 U.S.C. § 1592, which action falls within the court's jurisdiction under 28 U.S.C. § 1582. Currently before the court is a two-prong motion by defendant Ralph Nussbaum ("Nussbaum") which requests (1) a judgment on the pleadings under CIT Rule 12(c) for dismissal of this action as to himself personally; and (2) a stay of the Government's current discovery requests until 30 days after the date upon which the court rules upon the motion for judgment on the pleadings.

Nussbaum advances two defenses to the Government's penalties action: (1) in the administrative proceedings at the U.S. Customs Service

("Customs") against the corporate defendant Discount Locks, Inc. ("Discount Locks"), he was denied due process in his individual capacity because he was not personally named as a party in the pre-penalty and penalty notices; and (2) the action against him in his individual capacity is barred by the five-year statute of limitations pursuant to 19 U.S.C. § 1621.

The Government contends that although Nussbaum was not personally named as a party in the pre-penalty and penalty notices, he had, at the very least, constructive notice of a potential liability in his individual capacity for penalties, and therefore, he had an opportunity to defend himself individually. The Government further posits that Nussbaum's statute of limitations defense is precluded by the principle of equitable estoppel.

Under CIT Rule 12(c), if on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Since both parties rely on documentary exhibits outside the pleadings, Nussbaum's motion under Rule 12(c) will be treated as one for summary judgment.

Based upon the undisputed facts on Nussbaum's motion, his due process defense is rejected, but a decision on his defense based on the statute of limitations is reserved until completion of limited discovery concerning the issues raised by equitable estoppel. Nussbaum's motion to stay the Government's current discovery requests is granted.

II.

FACTUAL BACKGROUND

This case has a protracted and labyrinthine administrative background with its genesis in fifteen entries of safes at the Port of Newark, New Jersey by defendant Discount Locks during the period of July 30, 1988 through May 7, 1991. At the relevant period of time, Mr. Nussbaum was President and sole shareholder of Discount Locks. Nearly eight years ago, on September 23, 1992, Customs initiated administrative proceedings pursuant to 19 U.S.C. § 1592(b) and issued a pre-penalty notice addressed and mailed to Discount Locks. Exhibit A of the notice alleges that Discount Locks *and its principals* filed false entries, in that the certificates of origin claimed the safes had originated in Swaziland when in fact the safes were manufactured in South Africa. Inexplicably, Nussbaum—*the sole principal* of Discount Locks—was never named individually in any notices issued by Customs during the investigation or proceedings or made a party to the administrative proceedings in his individual capacity.

The notice further alleges that "the safes would have been subject to a 5.7% duty rate if entered as product of South Africa while importation of safes made in Swaiziland are designated GSP [duty-free]." Continuing, Exhibit A advises that Customs tentatively determined the level of culpability as fraud (false statements made deliberately, with an intent to defraud the revenue). The proposed penalty was $223,812.00, and loss

of revenue (duty) was in the amount of $12,757.28 Following receipt of the pre-penalty notice, Nussbaum wrote to Customs on behalf of Discount Locks seeking numerous extensions of times in which to respond (some 14), citing difficulty in obtaining information from South Africa, which requests were granted. By May 26, 1994, Discount Locks had retained its current legal counsel, Singer & Singh, Esqs., which thereafter requested several extensions of time to respond to the pre-penalty notice, forwarded waivers of the statute of limitations and corporate resolutions Customs had requested, and otherwise represented the interests of Discount Locks before Customs. On November 4, 1994, approximately two years after the pre-penalty notice was issued, Discount Locks through its legal counsel filed its response to the notice.

On January 18, 1995, and on March 23, 1995, Customs issued penalty and amended penalty notices to Discount Locks demanding penalties in the amount of $223,812.00 and duties in the amount of $12,757.28. The penalty notices did not name Nussbaum personally, or even as the principal of Discount Locks. After further extensions of time in which to respond to the penalty notices, on March 28, 1996 Discount Locks filed its response to the penalty notice. At the request of Customs, legal counsel for Discount Locks forwarded to Customs corporate resolutions and waivers of the statute of limitations. The waivers signed by Nussbaum on behalf of the corporation were dated April 15, 1993, April 15, 1994, September 14, 1995, and December 30, 1996. Customs never requested Nussbaum to sign a waiver of the statute of limitations in his individual capacity. The Government concedes that, consequently, with respect to Nussbaum personally, the five-year statute of limitations under 19 U.S.C. § 1621(1) became available to Nussbaum as an affirmative defense starting on July 30, 1993 and ending on May 7, 1996.

Following the expiration of the statute of limitations against Nussbaum individually as to all the subject entries, on March 21, 1997 counsel for Discount Locks forwarded to Customs a letter by Nussbaum dated March 20, 1997 which stated that "[d]ue to all the problems over the years, it was decided to discontinue operations." The letter went on to explain that the company had utilized all it s funds and that the corporation was unable to meet its obligations to certain creditors, and that "[t]his fact was a cause of extreme embarrassment to Discount Locks, Inc." There is no indication that Customs ever requested a financial statement from Discount Locks during the investigation. Thereafter, on April 8, 1997, Customs informed Discount Locks that the agency had mitigated the penalty to $51,029,28 for "gross negligence." Again, on August 1, 1997, counsel for Discount Locks forwarded to Customs a July 30, 1997 letter from a certified public accountant that stated: "In 1994 it was decided that due to the numerous problems and failures over many years, it was best to discontinue operations."

On December 21, 1998, approximately twenty-one months after receiving notice that Discount Locks had discontinued business in 1994, the Government commenced this action pursuant to 28 U.S.C. § 1582

against both Ralph Nussbaum and Discount Locks to recover civil penalties for violation of 19 U.S.C. § 1592. On January 22, 1999, the Government filed an amended complaint seeking recovery of penalties and duties for gross negligence with respect to false statements and omissions in the entries related to country of origin. On April 7, and May 12, 1999, Nussbaum and Discount Locks filed answers, and on August 2, 1999, the Government served upon the defendants its first set of requests for admissions, interrogatories and request for production of documents. Subsequently, Nussbaum and Discount Locks filed consent motions with the court seeking additional time in which to respond to these discovery requests. The court granted both motions. As a result, the deadline to respond to the Government' discovery requests was December 8, 1999. However, on December 7, 1999 the current motion was filed by Nussbaum requesting a stay of the Government's discovery for a period of 30 days from the decision of the motion for judgment on the pleadings.

III.

DISCUSSION

A.

DUE PROCESS DEFENSE.

Customs did not name Nussbaum in his individual capacity as a party to the administrative proceedings in the pre-penalty and penalty notices served under 19 U.S.C. § 1592 (only the corporate defendant Discount Locks, Inc. was named). Nussbaum, therefore, argues that since he was never given notice of proceedings against him in his individual capacity (*see* 19 U.S.C. § 1592 (b)(1)(A)),[1] he was denied his statutory and constitutional due process rights to notice and an opportunity to be heard with respect to his personal liability at the agency level. Moreover, argues Nussbaum, the fact that Customs repeatedly requested that he sign waivers of the statute of limitations only *on behalf of Discount Locks, and never requested a waiver of him personally*, logically led him to believe that he was not involved in the penalty proceedings in his individual capacity.

Both parties direct the court's attention to *United States v. Priority Products, Inc.*, 793 F. 2d 296 (Fed. Cir. 1986) as to the jurisdictional and due process issues in this case. There, the Government sued both the corporation and its shareholders (who were husband and wife) in their individual capacities seeking to recover civil penalties assessed under § 1592 for allegedly attempting to make fraudulent entries. Similar to

[1] This statutory provision reads: "If the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, it shall issue *to the person concerned* a written notice of its intention to issue a claim for monetary penalty." (Emphasis added.) The pre-penalty notice named and was issued solely to Discount Locks. The statute further requires that the notice "inform *such person* that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated." *Id. See also* 19 U.S.C. § 1592 (b)(2);19 C.F.R. § 162.78. Nussbaum insists that since he was never issued a notice in his individual capacity by Customs, he had no opportunity to be heard as to his personal liability. There is no evidence currently before the court that any issue as to Nussbaum's personal liability was ever raised by either Customs or Nussbaum.

the current situation, the Priority Products shareholders had not been named or served in their individual capacities by Customs in pre-penalty and penalty notices in administrative proceedings under § 1592. The individual defendants moved for summary judgment on the grounds, *inter alia*, that the Court of International Trade lacked subject matter jurisdiction over the part of the complaint against them individually because they had not been named in their individual capacities in the written pre-penalty and penalty notices, and they also claimed that such failure to name them individually violated their right to due process under the Fifth Amendment. The trial court denied the shareholder's motion to dismiss on jurisdictional and due process grounds, and the case proceeded to trial before a jury. The jury found all defendants—the shareholders and the corporation—jointly and severally liable for the penalties.

On appeal, the Federal Circuit rejected the shareholders' contention that the Court of International Trade was deprived of subject matter jurisdiction over the complaint against them personally because Customs failed to serve them in their individual capacities with written notice of their potential personal liability. Then turning to the due process issue, the Federal Circuit held that there was also no merit to the shareholder's contention they were deprived of due process by Custom's failure to serve them in their individual capacities with the statutory written pre-penalty and penalty notices since each of the shareholder defendants had either actual, or at the least constructive, notice of their potential personal liability. In view of the conclusion reached, the appellate court declined to also decide whether an opportunity for a trial *de novo* afforded the shareholder defendants with all the process to which they were entitled, citing *Nickey v. Mississippi*, 292 U.S. 393 (1934).

The Federal Circuit held that the husband shareholder clearly had *actual* notice since he understood that Customs might sue him in his personal capacity to recover the penalty, he presented arguments to Customs regarding his lack of personal culpability, and he also hired an attorney whom he apparently consulted regarding his personal participation in the attempted importation. *Id.* at 300. On these particular facts, *Priority Products* is not an analogue for a finding that Nussbaum had *actual* notice since there is no showing by the Government that Nussbaum actually understood he had a potential personal liability and presented arguments to Customs regarding his personal culpability. As previously noted, no issue as to individual liability was ever raised at the administrative level.

With respect to the wife, the appellate court rejected the trial court's dismissal of her due process objection on the ground she also had *actual* notice and an opportunity to participate in the administrative proceedings as an individual. However, "*on the narrow facts of this case*" the appellate court upheld the trial court's dismissal of her due process claim on the basis that "at the very least, [the shareholder] had *constructive* notice of her potential liability * * *." *Id.* at 301 (emphasis added).

Specifically, constructive notice to the wife-shareholder of her potential personal liability was predicated on the following "*limited facts*": during the time of the importation she was one of only three officers of Priority and admitted she was largely responsible for making the important decisions regarding the attempted importation; Priority was a close corporation and after the administrative proceedings were just underway, the husband and wife became the sole shareholders, employees and officers of Priority; "as one of only two employees/officers/shareholders of a small family corporation, [the wife] was or should have been aware that *under certain circumstances* she could be held accountable for Priority's liabilities"; and it was also significant "that she had access to the corporation's attorney whom she could have consulted, and perhaps did consult, regarding the probability of whether she might be called upon to pay some or all of the mitigated penalty." *Id.* at 301 (emphasis added).

Although *Priority Products* was expressly decided by the Federal Circuit on its "limited facts," and personal liability expressly occurs only in "certain circumstances," it would appear that being a sole officer/director/shareholder of a small corporation represented by legal counsel and personal participation in the importations are significant concomitants of constructive notice of a potential personal liability for penalties. Accordingly, while not dispositive in the current matter, under the undisputed facts presented on Nussbaum's motion, the *Priority Products*' rational is instructive.

Here, at the time of the importations and during the administrative proceedings, Nussbaum was President, sole director and sole shareholder—and, therefore, sole principal—of Discount Locks; he actively participated in the importations; and, significantly, too, Discount Locks, through Nussbaum, retained legal counsel in 1994, with whom he could have consulted, and perhaps did consult, concerning his participation in the subject importations and entries. Discount Locks legal counsel even had the benefit of the 1986 *Priority Products* decision.

Nussbaum distinguishes *Priority Products* on the basis that unlike the individual defendants in *Priority Products*, *supra*, defendant Ralph Nussbaum neither suspected that he might be a defendant in a law suit, nor did he make any representations to the Customs Service in his own behalf concerning his personal culpability as the question never came up. Nussbaum also points up that unlike *Priority Products*, Customs requested and received waivers of the statute of limitations solely from Discount Locks, from which fact he was "led to the logical conclusion" that Customs' proceedings were not against him individually. The court must agree that Nussbaum could justifiably assume Customs had no intent to sue him personally. The fact, stressed by the Government, that the pre-penalty notice charged the corporation and its *principals* with filing false entries, standing alone was plainly insufficient to put Nussbaum on *actual* notice of his potential personal liability. Nonetheless, based on the facts that Nussbaum was president, sole director, and sole

shareholder of the corporation, he participated in the subject importations, and he had access to the corporation's legal counsel, under the rational of *Priority Products* he had constructive notice of his potential personal liability, which satisfies his due process rights to notice and opportunity to be heard at the administrative level.

In view of the foregoing conclusion, as in *Priority Products*, it is unnecessary to also decide whether an opportunity for a trial *de novo* affords Nussbaum with all the process to which he is entitled, *See Nickey v. Mississippi*, 292 U.S. 393 (1934).

B.

NUSSBAUM'S STATUTE OF LIMITATIONS DEFENSE.

As previously mentioned, Nussbaum contends that for all the subject entries the five-year statute of limitations under 19 U.S.C. § 1621(1)[2] became available to him as an affirmative defense starting on July 30, 1993 and ending on May 7, 1996. Hence, Nussbaum maintains that this action, commenced in 1998, is time-barred as to himself in his individual capacity as to all the subject entries. Plaintiff responds that as in the case of statutes of limitations generally, waiver and estoppel preclude raising this affirmative defense, citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 235 (1959) (respondent induced delay by petitioner in filing suit by misrepresenting to petitioner that he had seven years in which to sue when in fact he had only three years; if petitioner could prove that respondent's agents conducted themselves in such as way he was justifiably misled into good-faith belief that he could commence suit anytime within seven years after it accrued, equitable estoppel would preclude the action from being barred by the statute of limitations); and *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446. 450 (7th Cir. 1990) (equitable estoppel would preclude defendant from arguing that the action is time-barred "if the defendant takes active steps to prevent the plaintiff from suing in time * * *.").

According to the Government, the waivers executed solely on behalf of Discount Locks on April 15, 1993, April 15, 1994, September 14, 1995, and December 30, 1996, the many extensions of time to respond to the notices, and failure to disclose until 1997 that Discount Locks had discontinued its business in 1994 are factors that are relevant to whether Nussbaum's reliance upon the statute of limitations may be inequitable and precluded. In essence, the Government posits that Nussbaum may have misrepresented its stated need for the extensions of time to respond to the notices, and may have simply requested extensions to mislead and dupe Customs into delaying action against Nussbaum in his individual capacity. The Government also essentially suggests that

[2] This section provides: "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered; *Provided*, That in the case of an alleged violation of section 592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed." As previously mentioned, the entries at issue were made during the period of July 30, 1988 to May 7, 1991.

Nussbaum had a continuing fiduciary duty to inform Customs of the financial status of the corporation when Customs requested corporate waivers and resolutions. Therefore, the Government seeks discovery "needed to determine whether the doctrine of equitable estoppel should preclude Ralph Nussbaum from raising the statute of limitations as an affirmative defense," *Pltf's Mem.*, at 15.

In order to give the Government a full opportunity to rebut Nussbaum's affirmative defense of the statute of limitations under the principle of equitable estoppel, the Government shall be permitted limited new discovery into whether Nussbaum through any deceit, misrepresentations, or concealment of financial information he had a duty to submit in connection with the extensions or waivers justifiably lulled Customs into delaying commencement of its action against Nussbaum personally until 1998.

The Government has a heavy burden to persuade the court to find, as urged by the Government, that Nussbaum took "active steps to prevent the plaintiff from suing in time." *Pltf's Mem. at 11*, or that Customs was "lulled into a false security," *see Glus* at 233. Requests for extensions of time to respond to Customs' notices to obtain information and signing waivers demanded by Customs during the pendency of a protracted investigation are routine practices. Moreover, for a variety of reasons, some businesses succeed while others fail, and the latter could very well occur in the course of protracted administrative proceedings running over many years, such as those that occurred in this case.[3]

Fundamentally, then, Nussbaum's compliance with Customs' demands for waivers of the statute of limitations solely on behalf of Discount Locks, the many extensions of time to respond to the notices, and the discontinuance of a failing business during the course of the very protracted administrative proceedings are not *per se* wrongful or inequitable conduct. Accordingly, to establish any of the foregoing factors relied on by the Government as a basis for invoking equitable estoppel, the Government must submit evidence that Customs was justifiably mislead or duped into not taking timely legal action against Nussbaum personally by conduct while normally routine, somehow under the circumstances of this case were "inequitable."

Significantly, too, Discount Locks was represented by legal counsel at the time of the extensions requested on May 26, 1994, June 27, 1994, July 28, 1994, August 29, 1994, September 29, 1994 and October 28, 1994, at the time the waivers of the statute of limitations were signed on September 14, 1995 and December 30, 1996, and indeed counsel forwarded to Customs the letters by Nussbaum and his accountant on March 21, 1997 and August 1, 1997. Thus, many of the events relied on

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[3] A part of the alleged plot and scheme to dupe Customs into delaying action against Nussbaum personally, the Government has represented to the court that Nussbaum not only concealed discontinuance of Discount Locks in 1994, but also concealed a surreptitious succession of Discount Lock by DLI Safes in 1994. *Pltf's Mem. at 20* However, the court agrees with Nussbaum that as evidenced by numerous documents submitted to the court in plaintiff's appendices, the existence of DLI Safes was well-known to Customs, at least as far back as 1992, long prior to the discontinuance of Discount Locks. Simply put, a surreptitious succession of Discount Locks by DLI Safes in 1994, as claimed by the Government, is refuted by its own documentary exhibits.

by the Government as grounds for equitable estoppel were handled by defendants' current able legal counsel. Consequently, the Government's allegations of inequitable or wrongful conduct indirectly (and perhaps unintentionally) implicate possibly serious concerns relating to defendants' legal counsel as well as Nussbaum. Counsel for defendants vigorously dispute there was anything surreptitious or nefarious concerning the extensions and waivers. *Nussbaum's Reply Br. at 6–10.*

Candidly, while from a careful review of the voluminous documentary record before the court on Nussbaum's motion (*i.e.*, plaintiff's appendices) the court seriously doubts that the Government can discover any evidentiary support for its equitable estoppel theory, the court nevertheless in the exercise of its discretion grants plaintiff the opportunity it requests to obtain discovery relevant to equitable estoppel. Given the lengthy history of the administrative proceedings and the Government's long delay in commencing this action, the court sees no prejudice to the Government if at this juncture its currently pending extensive discovery requests are stayed, and the Government presently limits its discovery to the issues arising out of the statute of limitations and equitable estoppel. Until the court rules on Nussbaum's dispositive motion that the action is time-barred as to him in his individual capacity, defendants should not be required to incur the substantial expenditures of legal fees and costs in responding to the currently pending extensive and wide-ranging discovery requests of the Government.

While it is true, as asserted by the Government, that its pending discovery is directed at both defendants, and not just Nussbaum, resolution of the statute of limitations defense of Nussbaum personally may substantially affect whether the Government wishes to continue incurring substantial costs to proceed solely against the apparently financially defunct corporate defendant. Therefore, the interests of all parties would be best served at this juncture if discovery is limited to whether equitable estoppel is applicable in this case to the statute of limitations defense.

IV.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED:

1. Nussbaum's motion for dismissal of the action on due process grounds is DENIED.

2. Decision of Nussbaum's motion for dismissal on the ground that the action is barred by the statute of limitations shall be reserved.

3. Within thirty days of the date of this order, the parties may serve discovery requests *limited solely* to whether there were any misrepresentations, deceptions, unlawful concealments, or misleading conduct concerning Discount Locks' requests for extensions of time, waivers of the statute of limitations, or the discontinuance of business in 1994, and to whether Customs was thereby justifiably misled or deceived into delaying commencement of an action against Nussbaum personally. The

foregoing discovery shall be completed by no later than ninety days from the date of this order.

4. Within thirty days after completion of the foregoing limited discovery, Nussbaum may renew his affirmative defense based on the statute of limitations.

5. Responses by defendants to the currently pending discovery requests of the Government shall be stayed for thirty days after a decision as to whether this action is barred by the statute of limitations with respect to Nussbaum personally.

(Slip Op. 00–30)

MARION OWEN SAVAGE, PLAINTIFF *v.*
HERMAN, SECRETARY OF LABOR, DEFENDANT

Court No. 99–02–00097

(Dated March 24, 2000)

ORDER

MUSGRAVE, *Judge:* In this action, plaintiff, proceeding *pro se,* seeks review of the Department of Labor's determination that he was ineligible for trade adjustment assistance benefits after his employment with Hooper Trucking Company, Odessa, TX, was terminated. Plaintiff filed this action on February 18, 1999 and a scheduling order was entered on July 22, 1999. Pursuant to the scheduling order, which was agreed to by both parties, plaintiff was to file his motion and brief for judgment upon the agency record, pursuant to Rule 56.1 of the Rules of this Court, by September 15, 1999. Plaintiff did not file his motion and brief by this deadline and made no request for an extension of time in which to file. Shortly after the deadline passed, a member of the Court's case management staff made several attempts to contact plaintiff by phone. Plaintiff was not at home to receive these calls, but messages were left with persons who identified themselves as relatives of the plaintiff. Plaintiff never returned these phone calls or made any further written submissions to the Court.

On February 9, 2000, the Court sent a letter to plaintiff which explained that he had missed the original deadline for filing his motion and brief and recounted the Court's efforts to contact him by phone. The Court stated that even though the original deadline had passed, it would still accept plaintiffs motion and brief if they were filed by March 10, 2000. If plaintiff was no longer interested in pursuing this action, the Court asked that he submit a letter stating this fact. The Court informed plaintiff that if it did not receive either a brief or letter by March 10, 2000, it would assume that plaintiff was no longer interested in pursuing this action, and the action would be dismissed.

To date, plaintiff has made no submission to the Court; therefore, it is hereby

ORDERED that, pursuant to Rule 41(b)(2) of the Rules of this Court, this action is dismissed for lack of prosecution.

(Slip Op. 00–31)

WILLIAM T. CONNOR II, AS TRUSTEE OF THE WILLIAM T. CONNOR II LIVING TRUST, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 99–02–00094

[Defendant's Motion to Dismiss granted.]

(Decided March 27, 2000)

Joel R. Junker, P. C. (Joel R. Junker), for plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(James A Curley);* of counsel: *Beth C. Brotman,* Office of Assistant Chief Counsel, United States Customs Service, for defendant.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge:* In this action, Plaintiff William T. Connor, II, Trustee of the William T. Connor II Living Trust ("the Trust"), seeks judicial review of a pre-importation ruling issued by the United States Customs Service ("Customs") concerning the classification of a 1929 Bentley Blower racing car ("the Bentley" or "the automobile"). Plaintiff alleges jurisdiction and requests that the Court issue a declaratory judgment pursuant to 28 U.S.C. § 1581(h), which provides that

> [t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

Presently before the Court is Defendant's Motion to Dismiss for lack of subject matter jurisdiction based, *inter alia,* on the ground that plaintiff has not demonstrated that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation. For the reasons set forth herein, Defendant's motion is granted, and this action is dismissed.

BACKGROUND

On December 23, 1997, Plaintiff filed a ruling request with Customs pursuant to 19 C.F.R. § 177.[1] In this request, Plaintiff asserted that the Bentley should be classified under subheading 9705.00.0090 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides for duty-free entry of "[c]ollections, and collector's pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic, or numismatic interest. Other." Plaintiff argued that this classification was appropriate because the Bentley is a collector's item and, as such, it will not be, used for any utilitarian purpose. The automobile will instead be entered in classic car shows and made available for display in the Peterson Automobile Museum in the Natural History Museum of Los Angeles County. Pl.'s Resp. to Def's Mot. to Dismiss ("Pl.'s Resp. Br."), Ex. 1, Pl.'s Ruling Req., at 2.

On November 5, 1998, Customs ruled that the Bentley did not meet the requirements for classification under HTSUS 9705.00.0090 because "[t]he guidelines of the [Explanatory Notes] indicate a narrow interpretation of coverage under [the heading]", and the Bentley did not fit under the list of samples. Def.'s Br. in Supp. of Mot. to Dismiss, Ex. 1, HQ 961279, at 3.

On February 22, 1999, Plaintiff filed the present action seeking judicial review of Customs' ruling. Defendant, after answering the complaint, filed the Motion to Dismiss which is now before the Court.

DISCUSSION

Defendant argues that the Court does not have jurisdiction because Plaintiff has not demonstrated, as required by 28 U.S.C. § 1581(h), that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation. Generally, "[w]hen a jurisdictional issue is raised, the burden rests on the plaintiff to prove that jurisdiction exists." *Heartland By-Products, Inc. v. United States*, ___ CIT ___, 74 F. Supp. 2d 1324, 1330 (1999) (quoting *Manufacture de Machines du Haut-Rhin v. Von Rabb*, 6 CIT 60, 62, 569 F. Supp. 877, 880 (1983)) (citation omitted). Pursuant to 28 U.S.C. § 2639(b), the plaintiff in a § 1581(h) action must prove irreparable harm by clear and convincing evidence, which means that there must be proof that the harm is highly probable. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992).

Recently, in *Heartland By-Products* the Court summarized its jurisprudence regarding the irreparable harm requirement of § 1581(h):

> Irreparable harm is that which "cannot receive reasonable redress in a court of law." *Manufacture de Machines du Haut-Rhin v. Von Rabb*, 6 CIT at 64, 569 F. Supp. at 881–82 (1983) (quoting Black's

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[1] 19 C.F.R. § 177.1(a)(1), regarding prospective transactions, states that

> [i]t is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation. For this reason, the Customs Service will give full and careful consideration to written requests from importers and other interested parties for rulings or information setting forth, with respect to a specifically described transaction, a definitive interpretation of applicable law, or other appropriate information.

> Law Dictionary 706–707 (5th ed. 1979)). "In making this determination, what is critical is not the magnitude of the injury but rather its immediacy and the inadequacy of future corrective relief." *National Juice Products v. United States,* 10 CIT 48, 513, 628 F. Supp. 978, 984 (1986) (citations omitted). To fulfill its burden, Plaintiff must "set forth sufficient documentation to support its allegations in establishing the threat of irreparable harm." *Thyssen Steel Co., Southwestern Division of Thyssen, Inc. v. United States,* 13 CIT 323, 326, 712 F. Supp. 202, 204 (1989) (citing *718 Fifth Avenue Corp. v. United States,* 7 CIT 195, 198 (1984)).

Heartland By-Products, 74 F. Supp. 2d at 1330. Based on this precedent, Plaintiff must show clear and convincing evidence of an immediate harm for which there will be no adequate future relief in order to establish jurisdiction in the case at bar.

Several prior cases of this Court illustrate the requisite standard. In *Heartland By-Products,* the Court found a threat of irreparable harm where the plaintiff, an importer of sugar syrup, produced evidence that a new Customs ruling would destroy its business. 74 F. Supp. 2d at 1330–31. Specifically, the ruling would have reclassified the plaintiff's product under a heading with a 7000 percent higher tariff rate, thereby forcing the plaintiffs customers to seek another supplier. *Id.* at 1330. Moreover, in *American Frozen Food Institute, Inc. v. United States,* 18 CIT 565, 855 F. Supp. 388 (1994), the Court found a threat of irreparable harm where the plaintiffs, who were in the business of packaging and marketing frozen produce, provided evidence that they would incur tremendous costs in having to destroy old labels and produce new ones to comply with a Treasury Decision regarding country-of-origin markings. 18 CIT at 570–71, 855 F. Supp. at 393–94. These costs could not be recovered even if they ultimately prevailed in their case after changing the labels and importing the goods. *Id.* In another case involving country-of-origin labeling requirements, *National Juice Products Association v. United States,* 10 CIT 48, 628 F. Supp. 978 (1986), the Court found a threat of irreparable harm where the plaintiffs provided evidence that they would suffer severe business disruption because they could not comply with the new requirements by the required deadline. 10 CIT at 53–54, 628 F. Supp, at 984–85. Plaintiffs also proved that they would suffer significant financial loss from having to destroy old labels and produce new ones to achieve compliance and could not recover these costs even if they ultimately prevailed in their case after importing the goods. 10 CIT at 54, 628 F. Supp. at 985.

In the present case, Plaintiff alleges that if he is not afforded judicial review prior to importing the Bentley, he will be subject to "an immediate, unnecessary, and unacceptable risk of irreparable loss by shipping the unique, rare, and irreplaceable Bentley Blower just to 'exhaust administrative remedies.'" Pl.'s Resp. Br. at 17. However, Plaintiff has not produced clear and convincing evidence that the Bentley will be damaged or destroyed in shipment. Plaintiff has argued that "ships sink and planes crash," Pl.'s Resp. Br. at 14, but in order to prove jurisdiction un-

der 28 U.S.C. § 1581(h) Plaintiff must show, as in the cases discussed above, that there is an immediate threat that the harm will occur, not just an immediate threat that the harm *could* occur. *See National Juice Products Association*, 10 CIT at 53, 628 F. Supp. at 984 ("[W]hat is critical is * * * [the injury's] immediacy and the inadequacy of future corrective relief.").

The present case is also factually distinguishable from those cases where the Court found irreparable harm in that Plaintiff is not under any contractual obligation to import the Bentley, and could decide either to keep the car in its present location, or to move it to a different country. As John L. Shadek, legal counsel to the Trust, states in his affidavit,

> [p]art of the considerations in possibly selecting the United States as a situs for the Trust's collection includes the treatment by US Customs of the importation of the consolidated collection of the Trust. It is not worth the Trust's taking the risk of irreplaceable and non-compensable loss of a rare antique automobile of significant historical and commercial value simply for the purposes of determining whether US Customs' treatment of the Trust's collection is appropriate to siting the Trust's collection in the United States. In other words, it is imprudent for the Trust to undertake the risk of irreplaceable and non-compensable harm just to determine Customs' treatment of the importation as a precondition to determining whether the United States is an appropriate situs for consolidation of its collection of rare antique automobiles.

Pl.'s Resp. Br., Ex. 4, Shadek, Aff. ¶ 5. The plaintiffs in *Heartland By-Products, American Frozen Food Institute,* and *National Juice Products Association, supra,* did not have an option such as this because their business contracts obligated them to import their respective goods into the United States. Thus, in the present case, even if Plaintiff proved that he would suffer actual harm, as opposed to the risk of harm, by importing the Bentley to obtainjudicial review, the harm would not be imminent because Plaintiff could elect not to import the automobile.

As to the inadequacy of future relief, Plaintiffhas provided considerable evidence in the form of book excerpts and magazine and newspaper articles to support his claim that the Bentley is a unique automobile, which could not be replaced if it were destroyed. However, Plaintiff has not cited any evidence to support his claim that the automobile would be of less value if its original elements were damaged and repaired. Nevertheless, even if Plaintiff proved the inadequacy of future corrective relief, this alone would not defeat Defendant's motion to dismiss. In order to prevail, Plaintiff must show both the immediacy of injury *and* the inadequacy of future corrective relief. As stated above, Plaintiff has not provided evidence of an imminent injury. Therefore, the Court does not have subject matter jurisdiction over this case, and it must be dismissed.

Plaintiff presents two alternative grounds to support the Court's jurisdiction in the absence of a showing of irreparable harm. First, Plaintiff argues that the Court has erred as a matter of law in setting the same requirements for proving irreparable harm in the context of requests for

injunctive relief and § 1581(h) actions. Plaintiff notes that where equitable relief is sought, "the 'irreparable harm' requirement functions as a check on unreasonable use or abuse of the exercise of [the Court's] inherent powers unrestricted by statute." Pl.'s Resp. Br. at 18. Plaintiff contrasts this function of the irreparable harm requirement with its function in a § 1581(h) case, where it "is an element of an affirmative statutory grant of jurisdiction." *Id.* Plaintiff proposes that the proximity of the harm should not be a factor in a case brought under § 1581(h) because this consideration "has limited relevance inasmuch as review of rulings on contemplated importations * * * involves anticipated, prospective activity and because no one's interests are impinged by the court's granting relief on a finding of 'irreparable harm' in advance of hearing the merits." *Id.* at 19. Plaintiff argues that the test for irreparable harm under "§ 1581(h) should be based first and foremost on whether the harm involves risk injury [*sic*] for which a monetary reward cannot be adequate compensation and injury that cannot receive reasonable redress in a court of law." *Id.*

The Court has previously recognized that "[t]he standard for proving irreparable harm [in a § 1581(h) case] is essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought." *718 Fifth Avenue Corp. v. United States,* 7 CIT 195, 196 n. 3 (1984) (citing *Manufacture de Machines du Haut-Rhin v. Von Rabb,* 6 CIT 60, 569 F. Supp. 877 (1983)). Moreover, Congress intended § 1581(h) to provide jurisdiction only under exceptional circumstances. *See Manufacture de Machines du Haut-Rhin,* 6 CIT at 63, 5 69 F. Supp. at 882; H.R. Rep. No. 96–1235 at 47 (1980) *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758 (pre-importation judicial review "is exceptional and is authorized only when the requirements of subsection (h) are met."). In this regard, review under § 1581(h) is similar to a grant of equitable relief, which is available only under extraordinary circumstances. *See Wolverine Tube (Canada), Inc. v. United States,* ____ CIT ____, 36 F. Supp. 2d. 410, 412 (1999). In both instances, irreparable harm is one of the essential factors for establishing that such exceptional or extraordinary circumstances exist. *Compare Wolverine Tube (Canada), Inc.,* 36 F. Supp. 2d at 412 *with National Juice Products Association,* 10 CIT at 51, 628 F. Supp. at 982. Thus, it is appropriate for the Court to use the same standard for proving irreparable harm in both injunctive relief and § 1581(h) actions.

Plaintiff also argues that the Court can maintain jurisdiction over this case under 28 U.S.C. § 1581(i).[2] Under normal circumstances, if jurisdiction does not lie under § 1581(h), aplaintiff must import the merchandise in question, file a protest with Customs regarding the classification decision, and fully exhaust its administrative remedies. *See* H.R. Rep. No. 96–1235 at 46 (1980) *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758. If an issue still remains, the plaintiff can then seek review by this Court pursuant to 28 U.S.C. § 1581(a).[3] The Court has previously stated that "section 1581(i) cannot be used to circumvent the procedures set forth by section 1581(a)." *Manufacture de Machines du Haut-Rhin,* 6 CIT 60, 65, 569 F. Supp. 877, 882 (citing *United States v. Uniroyal,* 69 CCPA 179, 687 F.2d 467 (1982)). Furthermore, in *Lowa, Ltd. v. United States,* 5 CIT 81, 561 F. Supp. 441 (1983), *aff'd,* 724 F.2d 121 (Fed. Cir. 1984), the Court stated

> this court has subject matter jurisdiction under section 1581(i) of a cause of action, which otherwise would be within section 1581(a), only when the relief available under section 1581(a) is manifestly inadequate or when necessary, because of special circumstances, to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies.

5 CIT at 88, 561 F. Supp. at 447. *See Manufacture de Machines du Haut-Rhin,* 6 CIT at 65, 569 F. Supp. at 882–83; *United States Sugar Cane Refiners' Association v. Block,* 69 CCPA 172, 175, 683 F.2d 399, 402 (1982). In the present case, Plaintiff claims that relief under § 1581(a) is inadequate because the Trust may wish to import other classic automobiles, and it is likely that the classification of these automobiles will have to be reviewed on a case by case basis, resulting in "extraordinary and unjustified delays." Pl.'s Reply Br. at 19.

The Court notes that, as a procedural matter, § 1581(h) is the only jurisdictional basis alleged in the complaint, *see* Compl. ¶ 2, and Plaintiff has not moved to amend the complaint and include § 1581(i) as an alternative basis for jurisdiction. Substantively, the present case involves only one automobile, the Bentley. *See* Compl. ¶ 1. Although Plaintiff may import other automobiles in the future, that possibility is only speculative at this point, and not at issue in this action. Thus, the prospective importation of other automobiles in Plaintiffs collection is irrelevant to the determination of whether § 1581(a) provides adequate relief in the matter presently before the Court. Plaintiff has not present-

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[2] 28 U.S.C. § 1581(i) provides, in pertinent part, that

> [i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenues from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

[3] 28 U.S.C. § 1581(a) provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

ed any evidence which suggests that proceeding under § 1581(a) is "manifestly inadequate" or will cause "extraordinary and unjustified delays" with regard to determining the correct classification of the Bentley. Therefore, there is no basis for jurisdiction under § 1581(i).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted. So ordered.

(Slip Op. 00–32)

SKF USA INC., SKF GMBH, FAG KUGELFISCHER GEORG SCHAFER AG, AND FAG BEARINGS CORP., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF, AND NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, AND SNR ROULEMENTS, DEFENDANT-INTERVENORS

Consolidated Court No. 97–01–00054–S

(Dated March 29, 2000)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *SKF USA Inc. v. United States*, 23 CIT ____, Slip Op. 99–127 (Dec. 2, 1999) ("Remand Results"), and Commerce having complied with the Court's remand, it is hereby

ORDERED that the Remand Results filed by Commerce on March 1, 2000 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 00–33)

NEENAH FOUNDRY CO. ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA AND UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS

Court No. 99–11–00716

[Plaintiffs' motion to stay this action denied.]

(Dated March 31, 2000)

Collier, Shannon, Rill & Scott, PLLC (Paul C. Rosenthal and *Robin H. Gilbert)* for the plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Deputy General Counsel, and *Charles A. St. Charles*, Attorney-Advisor, for the defendant United States International Trade Commission.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* This action contests the "sunset review" determination of the International Trade Commission ("ITC") pursuant to 19 U.S.C. §1675(c)(1) (1995) that

> revocation of the countervailing duty order on iron metal castings from India would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Iron Metal Castings From India; Heavy Iron Construction Castings From Brazil; and Iron Construction Castings From Brazil, Canada, and China, 64 Fed.Reg. 58,442 (Oct. 29, 1999). This decision caused the International Trade Administration, U.S. Department of Commerce ("ITA") to publish its notice of *Revocation of Countervailing Duty Order: Iron Metal Castings From India*, 64 Fed.Reg. 61,602 (Nov. 12, 1999), whereupon the same plaintiffs as appear herein, and which had earlier commenced an action against the ITA, contesting its *Amended Final Results of Expedited Sunset Review: Iron Metal Castings From India*, 64 Fed.Reg. 37,509 (July 12, 1999), moved therein for a preliminary injunction, continuing suspension of liquidation of entries of such merchandise pending this court's resolution of their action(s).

That relief was denied *sub nom. Neenah Foundry Co. v. United States*, 24 CIT ____, ____, F.Supp.2d ____ (Jan. 20, 2000)[1], but this court did recognize concern on the part of the plaintiffs that judicial review and any necessary, resultant, further administrative proceedings could consume, in regular course, much time—free of the long-standing countervailing-duty order[2], and the parties to both aforementioned actions were thus invited to present dispositive issues in an expeditious manner.

Notwithstanding this invitation, come now the plaintiffs with a Motion to Stay Proceedings herein, asserting that

> the outcome of the related case, Court No. 99–07–00441, could have a significant impact on this case * * *, [and] plaintiffs believe the in-

[1] This opinion, familiarity with which is presumed, will be cited hereinafter as "Slip Op. 00–7".

[2] *Certain Iron Metal Castings from India: Countervailing Duty Order*, 45 Fed.Reg. 68,650 (Oct. 16, 1980).

> terests of justice and judicial economy justify a stay of this proceeding until final resolution has been reached in the related case.

This motion is opposed by the defendant ITC, which represents in its papers that the intervenor-defendants join in this opposition. They summarize their position, in part, as follows:

> [P]laintiffs have not shown that their separate challenge of the Commerce sunset results will cause exceptional circumstances warranting Commission reconsideration of its sunset determination. A stay of proceedings in this action pending judgment in *Neenah* * * * is inappropriate in the absence of a clear nexus between the issues in this action and the potential outcome of Court No. 99–07–00441.

Opposition of Defendant ITC, p. 6. Given the current, preliminary status of both actions, this court cannot disagree. *See generally* Slip Op. 00–07, pp. 13–17.

Of course, a long- and still-standing principle of Anglo-American jurisprudence is that a party plaintiff is the master of its complaint. *See, e.g., City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987); *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1914); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1912). It is equally well-established, however, that

> the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.

Landis v. North American Co., 299 U.S. 248, 254 (1936). *See, e.g., American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("In the exercise of a sound discretion[, a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same"); *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed.Cir. 1997) ("When and how to stay proceedings is within the sound discretion of the trial court").

In exercising this discretion, a court "must weigh competing interests and maintain an even balance"[3], taking into account those of the plaintiff, the defendant, non-parties or the public, and even itself. *See, e.g., Hill v. Mitchell*, 30 F.Supp. 2d 997, 1000 (S.D.Ohio 1998); *Schwartz v. Upper Deck Co.*, 967 F.Supp. 405, 416 (S.D.Cal. 1997); *Koulouris v. Builders Fence Co.*, 146 F.R.D. 193, 194 (W.D.Wash. 1991), citing *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D 53, 56 (E.D.Penn. 1980); *McDonald v. Piedmont Aviation Inc.*, 625 F. Supp. 762, 767 (S.D.N.Y. 1986). However,

> the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possi-

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[3] *Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936).

> bility that the stay for which he prays will work damage to some one else.

Landis v. North American Co., 299 U.S. at 255. In other words, a movant must "make a strong showing" that a stay is necessary and that "the disadvantageous effect on others would be clearly outweighed." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983).

Plaintiffs' request herein is primarily based upon the potential impact of the court's judgment in the related action against the ITA. Their thesis is that the issues raised in that appeal

> go to the heart of Commerce's determination regarding the subsidy rates anticipated to exist if the order on Indian castings were to be revoked. * * * If plaintiffs prevail in their appeal of the Commerce determination, the rates recalculated on remand could be significantly higher * * *.
>
> Because the Commission's negative determination was by a vote of four commissioners in the negative and two in the affirmative, a change in just one commissioner's decision from negative to affirmative could result in continuation of the CVD order. The record of the Commission's determination shows unquestionably that the commissioners who voted in the negative were influenced in their decisions by the low subsidy rates found by Commerce * * *. If plaintiffs prevail on one or more issues raised in the Commerce litigation, and Commerce increases the net countervailable subsidy rates on remand, it would be appropriate for the Commission voluntarily to take a remand or for the Court to order a remand to the Commission for its consideration of the change in this material evidence.

Plaintiffs' Motion to Stay Proceedings, pp 2–3. In assessing the competing interests, the plaintiffs claim that "a stay of this proceeding will have no adverse impact on any party", that "it would streamline significantly the issues in this appeal", and,

> depending upon the results of the Commerce appeal, plaintiffs might not continue their appeal of the ITC determination, thus saving the parties from briefing the issues in this case altogether.

Id. at 8.

Whatever the virtue of this analysis, counsel for the Commission point out that the plaintiffs

> have provided no basis to find it likely that, if Commerce were to complete a remand determination, the revised results would be of an "exceptional" nature, justifying the Commission's reexamination of its earlier determination * * * [or] for their claim that * * * the margins found by Commerce could increase substantially.

Opposition of Defendant ITC, pp. 4, 5. Furthermore, the "[p]laintiffs acknowledge * * * that their second claim, concerning * * * application of the cumulation provision, 'could be considered prior to any determination of the Commerce appeal'". *Id.* at 5, quoting Plaintiffs' Motion to Stay Proceedings, p. 7.

While the defendant does not argue that ITC interests would be seriously compromised by a stay, some harm is inherent in any denial of the right to proceed. *See, e.g., Landis v. North American Co.*, 299 U.S. at 255 ("Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both"); *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971) ("The right to proceed in court should not be denied except under the most extreme circumstances"). The question therefore is whether the plaintiffs are faced with such circumstances.

Clearly, they are not. Hence, their motion to stay this action must be, and it hereby is, denied. And the parties are thus hereby reminded of their commitment in the Joint Status Report filed herein pursuant to CIT Rule 56.2(a) to propose a briefing schedule within ten days of this adverse decision.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/21 3/21/00 Wallach, J.	USR Optonix, Inc.	97–02–00353	2846.90.80 3.7%	2846.90.20 Duty free	Agreed statement of facts	New York Europium Oxide 4N
C00/22 3/22/00 Wallach, J.	Keilen Ltd.	99–08–00509	6912.00.48 10.5%, 10.1%	6912.00.10 1.0%, 0.8%	Agreed statement of facts	Los Angeles Coarse-grained earthenware tableware or kitchenware pizza stones

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V00/8 3/28/00 Musgrave, J.	Skil Corporation	94–01–00076, 94–08–00452, 95–11–01420	Transaction value	United States paying Skil Corporation $262,643.00 plus interest provided by law See note on actual valuation on how to better phrase this next time	Agreed statement of facts	San Diego Cordless rechargeable screwdrivers and drills

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